Fenghua Development Sdn Bhd v Asia Commercial Finance (M) Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO 22-251 OF 1992
CLEMENT SKINNER JC
9 JULY 1999

Civil Procedure *— Want of prosecution — Failure of plaintiff to file list of documents and set action down for trial — Whether amounted to intentional and contumelious default — Whether inordinate and inexcusable delay — No explanation given — Whether prejudice to defendant — Whether plaintiff's failure amounted to complete, total or wholesale disregard for rules of court — Rules of the High Court 1980 O 34 rr 2(2), 8 & O 43 r 8(2)*

Civil Procedure *— Want of prosecution — Striking out for want of prosecution — Defendant appealed in respect of interlocutory proceedings — Whether plaintiff should continue prosecuting its claim — Whether failure amounts to want of prosecution — Rules of the High Court 1980 O 34 rr 2(2), 8 & O 43 r 8(2)*

On 22 April 1998, on a summons for direction taken out by the plaintiff, the deputy registrar ordered that the plaintiff and defendant serve on each other a list of documents verified by affidavit within 30 days and that the plaintiff then set the action down for trial within 30 days thereafter. Both the plaintiff and defendant failed to comply with the direction to serve their respective list of documents. Upon failure of the plaintiff to set the action down for trial as required, the defendant on 19 September 1998 filed an application to strike out the action for want of prosecution under O 34 rr 2(2) and 8(1) of the Rules of the High Court 1980 ('the RHC') and/or under the inherent jurisdiction of the court. At the date of filing of the defendant's application to strike out, there had been a delay of two months to set the action down for trial. The deputy registrar allowed the defendants' application and hence the appeal.

The grounds relied upon by the defendants in bringing its striking out application were: (i) there had been a delay in prosecuting the action since it was filed in 1992; and (ii) the plaintiff had failed to file a list of documents verified by affidavit and to set the action down for trial in accordance with the order made on 22 April 1998. Counsel for the defendant argued: (i) such failure amounted to intentional and contumelious default; (ii) there was inordinate and inexcusable delay for which no explanation had been given and which had caused prejudice to the defendant; and (iii) the plaintiff's failure amounted to complete, total or wholesale disregard for the rules of court which amounts to an abuse of process.

Held, allowing the appeal:

(1) The plaintiff was faced with the prospect of its action being dismissed if the defendant's appeal was successful: to require that

the plaintiff should nevertheless continue to prosecute its claim thereby incurring further costs and effort which may finally turn out to be a waste is to insist upon an unusually strict and impractical adherence to the rules which on the particular facts of this case is unwarranted. The plaintiff was entitled to adopt a practical approach and await the outcome of the appeal and in having done so cannot be faulted or accused of delay (see p 300G – H); *Bank Bumiputra (M) Bhd & Anor v Lorrain Esme Osman* [1990] 3 MLJ 481 followed. The defendant's complaint that there had been delay in the prosecution of this action after it was filed in 1992 was rejected (see p 3012B).

(2) The orders made on hearing of the summons for directions on 22 April 1998 were not peremptory or 'unless orders' and neither was this a case where the court had called on the plaintiff to show cause under O 43 r 8(2) of the RHC. Further, the defendant had not shown any other conduct on the part of the plaintiff which might be characterized as intentional and contumelious (see p 302B–C).

(3) Whether a period of delay is or is not inordinate is a question of fact, to be decided on the facts of each particular case (see p 302E). The period of two months delay in this case cannot be described as inordinate. The fact that the plaintiff has not sworn an affidavit in reply to explain the delay is not fatal nor would it advance the defendant's case on this ground. Even if it can be said that the delay of two months is inordinate and inexcusable, the defendant must still show that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants (see p 303E). Further, what the plaintiff had omitted to do cannot be characterized as complete, total or wholesale disregard for the rules (see p 306E–F).

[Bahasa Malaysia summary

Pada 22 April 1998, atas suatu saman untuk arahan yang diambil oleh plaintif, timbalan pendaftar mengarahkan bahawa plaintif dan defendan menyampaikan kepada satu sama lain suatu senarai dokumen-dokumen yang ditentusahkan melalui afidavit dalam 30 hari dan bahawa plaintif kemudiannya menetapkan tindakan tersebut untuk perbicaraan dalam 30 hari sesudah itu. Kedua-dua plaintif dan defendan gagal untuk mematuhi arahan untuk menyampaikan senarai dokumen-dokumen masing-masing. Di atas kegagalan plaintif untuk menetapkan tindakan untuk perbicaraan seperti mana yang dikehendaki, defendan pada 19 September 1998 memfailkan suatu permohonan untuk membatalkan tindakan untuk ketiadaan pendakwaan di bawah A 34 kk 2(2) dan 8(1) Kaedah-

Kaedah Mahkamah Tinggi 1980 ('KMT') dan /atau di bawah bidang kuasa sedia ada mahkamah. Pada tarikh pemfailan permohonan untuk membatalkan oleh defendan, terdapatnya kelewatan dua bulan dalam menetapkan tindakan untuk perbicaraan. Timbalan pendaftar membenarkan permohonan defendan-defendan dan maka itu, timbullah rayuan ini.

Alasan-alasan yang diberi oleh defendan dalam membawa permohonan pembatalan adalah: (i) terdapat kelewatan dalam pendakwaan tindakan tersebut memandangkan ia difailkan pada 1992; dan (ii) plaintif telah gagal untuk memfailkan senarai dokumen-dokumen yang ditentusahkan melalui afidavit dan menetapkan tindakan untuk perbicaraan mengikut perintah yang dibuat pada 22 April 1998. Peguamcara defendan menghujahkan: (i) keingkaran sedemikian terjumlah kepada kegagalan sengaja dan memalukan; (ii) terdapat kelewatan melampau dan tidak dapat dimaafkan yang mana tiada penjelasan telah diberikan dan yang telah mengakibatkan prejudis kepada defendan; dan (iii) kegagalan plaintif terjumlah kepada sikap tidak mengendahkan secara penuh dan menyeluruh terhadap kaedah-kaedah mahkamah yang terjumlah kepada penyalahgunaan proses.

Diputuskan, membenarkan rayuan:

(1) Plaintif berhadapan dengan prospek tindakannya dibuang jika rayuan defendan adalah berjaya: untuk memerlukan plaintif terus mendakwa tuntutannya dan mengakibatkannya menanggung kos-kos lanjut dan usaha yang mungkin akhirnya sia-sia sahaja adalah untuk mendesak kepatuhan luar biasa yang tegas dan tidak praktikal kepada kaedah-kaedah yang mana atas fakta-fakta tertentu kes ini adalah tidak wajar. Plaintif adalah berhak untuk mengambil pendekatan praktikal dan menunggu keputusan rayuan dan di dalam berbuat demikian tidak boleh disalahkan atau dituduh untuk kelewatan (lihat ms 300G–H); *Bank Bumiputra (M) Sdn Bhd & Anor v Lorrain Esme Osman* [1990] 3 MLJ 481 diikut. Aduan defendan bahawa terdapat kelewatan dalam pendakwaan tindakan ini setelah ia difailkan pada 1992 adalah ditolak (lihat ms 301B).

(2) Perintah-perintah yang dibuat pada pembicaraan saman untuk arahan pada 22 April 1998 bukannya mesti dipatuhi atau 'perintah-perintah wajib' dan kes ini bukannya suatu kes di mana mahkamah telah meminta plaintif untuk menunjukkan sebab di bawah A 43 k 8(2) KMT. Tambahan, defendan telah tidak menunjukkan apa-apa kelakuan lain di pihak plaintif yang mungkin disifatkan sebagai sengaja dan memalukan (lihat ms 302B–C).

(3) Sama ada tempoh kelewatan adalah atau bukannya melampau merupakan persoalan fakta, yang akan diputuskan di atas fakta-

fakta setiap kes yang tertentu (lihat ms 302E). Tempoh dua bulan di dalam kes ini tidak boleh digambarkan sebagai melampau. Fakta bahawa plaintif telah tidak bersumpah suatu afidavit jawapan untuk menjelaskan kelewatan tidak membawa padah atau akan memajukan kes defendan atas alasan ini. Jikalau ia boleh dikatakan bahawa kelewatan dua bulan tersebut adalah melampau dan tidak dapat dimaafkan, defendan mesti juga membuktikan bahawa kelewatan sedemikian akan menimbulkan risiko yang cukup besar bahawa tidak mungkin diadakan perbicaraan adil berkenaan dengan isu-isu di dalam tindakan atau sedemikian rupa yang kemungkinan akan menyebabkan atau telah menyebabkan prejudis serius kepada defendan-defendan (lihat ms 303E–F). Tambahan, apa yang plaintif telah gagal untuk buat tidak boleh dikategorikan sebagai sikap tidak mengendahkan secara keseluruhannya terhadap kaedah-kaedah mahkamah (lihat ms 306E–F).]

Notes

For cases on want of prosecution, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4974–5015.

Cases referred to

Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd & Ors (1997) The Times, 29 December (refd)

Bank Bumiputra (M) Bhd & Anor v Lorrain Esme Osman [1990] 3 MLJ 481 (folld)

Bernard Chai v Klang Port Authority [1999] 1 MLJ 650 (refd)

Birkett v James [1977] 2 All ER 801 (refd)

Choraria v Sethia (1998) The Times, 29 January (refd)

Cold Storage Singapore (1983) Pte Ltd v Management Corp of Chancery Court & Ors [1989] 3 MLJ 400 (refd)

Confidence Concrete Sdn Bhd v Shimizu-Peremba Sdn Bhd [1994] 1 MLJ 465 (refd)

Datuk Samy Vellu v Karpal Singh [1989] 3 MLJ 495 (refd)

Kuala Lumpur Finance Bhd v Yau Jiok Hua Kuala Lumpur Civil Suit No D423–1604–88 (refd)

Lee Chong Ah v Cheong Chee & Ors [1994] 3 CLJ 59 (refd)

Leong Seng Kiat v Law Peng Guan & Ors [1992] 2 CLJ 825 (refd)

Negara Properties Sdn Bhd (sued as a firm) & Ors v Akitek Bersekutu Malaysia [1995] 2 MLJ 185 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Public Finance Bhd v Natcom Development Sdn & Ors [1996] 2 MLJ 657 (refd)

R Rajasingam v Balwant Singh Purba [1996] 2 MLJ 549 (refd)

Toh Hock Thye v Toh Chwee Biow [1982] 1 MLJ 152 (refd)

Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin [1998] 4 MLJ 373 (refd)

A *Vasudevan v T Damoderan & Anor* [1981] 2 MLJ 150 (refd)
Yong Beng Credit Sdn Bhd v Tia Chong King t/a Polysan Co [1993] 4 CLJ 502 (refd)

B **Legislation referred to**

Rules of the High Court 1980 O 34 rr 2(2), 8(1), 8(2), O 43 r 8(2)

Lee Yen Lyn (*Chan & Associates*) for the plaintiff.
Rajvinder Singh (*Sidek, Teoh, Wong & Dennis*) for the defendants.

C *Cur Adv Vult*

Clement Skinner JC: This is an appeal brought by the plaintiff against the decision of the deputy registrar given on 30 December 1998, striking out the plaintiff's writ and statement of claim for want of prosecution.

D On 22 April 1998, on a summons for direction taken out by the plaintiff, the deputy registrar ordered that the plaintiff serve on the defendant a list of documents verified by affidavit within 30 days; that the defendant serve on the plaintiff a list of their documents verified by affidavit within 30 days; and that the plaintiff then set the action down for trial within 30 days thereafter.

E In submissions, counsel for the plaintiff worked out the relevant dates for compliance as follows: the plaintiff should have served their list of documents on or before 21 May 1998, whereafter the defendant should have served their list on or before 20 June 1998, and the action set down for trial by 19 July 1998. Counsel for the defendant does not dispute the above F dates.

Both the plaintiff and defendant failed to comply with the direction to serve their respective list of documents but when the plaintiff failed to set the action down for trial as required, the defendant on 19 September 1998 filed an application to strike out the action for want of prosecution under G O 34 rr 2(2) and 8(1) of the Rules of the High Court 1980 ('the RHC') and/ or under the inherent jurisdiction of the court. Accordingly, it is not in dispute that at the date of filing of the defendant's application to strike out, there had been a delay of two months to set the action down for trial.

The grounds relied upon by the defendants in bringing its striking out H application are:

(a) there has been a delay in prosecuting this action since it was filed in 1992;

(b) the plaintiff has failed to file a list of documents verified by affidavit I within the time stated in the order for directions of 22 April 1998;

(c) the plaintiff has failed to set the action down for trial in accordance with the order made on 22 April 1998.

Has there been delay since 1992? A

It is the submission of counsel for the defendant that it is seven years since this action was commenced in 1992 but the action has not been set down for trial. During which time there was a period of some 22 months when the plaintiff remained inactive. Counsel identified these 22 months as being that period between 18 December 1995 when an application made by the B defendant to dismiss the suit on grounds of limitation was disallowed, and October 1997 when the plaintiff gave notice of intention to proceed with this action.

The chronology of events in this case as traced by the deputy registrar shows that the action was commenced in 1992, and that on being served, C the defendant entered a conditional appearance and thereafter applied to strike out the suit on the grounds of res judicata (the first strike out application) which was only disposed of on 5 February 1994 when it was dismissed. Thereafter, as observed by the deputy registrar, about a year after the first strike out application was dismissed, the defendant on D 25 February 1995 filed a defence without having obtained any leave to do so. Then, in April 1995, the defendant filed another application to dismiss the action on the grounds of limitation (the second striking out application which was dismissed on 18 December 1995 was later appealed to the Supreme Court which disposed it on 15 July 1997). The plaintiff then gave notice of intention to proceed on 10 October 1997. E

The above chronology shows that the defendant's attempt to characterize the passing of seven years since the action was commenced as a period of delay is incorrect. If anything, it would not be an unfair observation to say that the litigation has become protracted and seven years have elapsed since the filing of the action mainly due to the defendant's first F and second strike out applications.

With regard to the period of 22 months alleged inactivity by the plaintiff, counsel for the defendant submitted that during that period when the defendant was pursuing its appeal against the second strike out decision, no stay of proceedings had been ordered and so the plaintiff should have got G on with its action. I regret I am unable to accept this submission. The plaintiff was faced with the prospect of its action being dismissed if the defendant's appeal was successful: to require that the plaintiff should nevertheless continue to prosecute its claim thereby incurring further costs and effort which may finally turn out to be a waste is to insist upon an unusually strict and impractical adherence to the rules which on the H particular facts of this case is unwarranted. In my judgment, the plaintiff on being faced with such a prospect was entitled to adopt a practical approach and await the outcome of the appeal and in having done so cannot be faulted or accused of delay. I find support for what I have said in the decision of Zakaria Yatim J, (as he then was) in the case of *Bank Bumiputra (M) Bhd & Anor v Lorrain Esme Osman* [1990] 3 MLJ 481, where the I defendant attempted to set aside certain mareva injunctions obtained against him on grounds, inter alia, that the plaintiff had not diligently

prosecuted its action and had only set down the action for trial after a pending appeal had been withdrawn by the defendant. To this complaint, Zakaria Yatim J, held that pending the disposal of the appeal, it would not have been practical to set the action down for trial.

I accordingly reject the defendant's complaint that there has been delay in the prosecution of this action after it was filed in 1992.

Consequence of failure to comply with order made on directions

The next two grounds relied upon by the defendant will be considered together. Counsel for the defendant took a three pronged attack on the failure of the plaintiff to comply with the order for directions. It was firstly said that such failure amounted to intentional and contumelious default. Secondly, it was said that there was inordinate and inexcusable delay for which no explanation has been given and which has caused prejudice to the defendant. Thirdly, it was said the failure constituted an abuse of process for which the action should be struck out.

The principles of law upon which a court will act in dismissing an action for want of prosecution, as expounded by Lord Diplock in the case of *Birkett v James* [1977] 2 All ER 801, have been accepted and applied by our highest courts since the Federal Court case of *Vasudevan v T Damoderan & Anor* [1981] 2 MLJ 150. This is what Lord Diplock, said at p 805 of his speech in *Birkett v James*:

> The power should be exercised only where the court is satisfied either: (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyer, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

With the above principles in mind, I turn to consider the submissions of the parties.

In reply to the submission that there has been intentional and contumelious default, counsel for the plaintiff whilst admitting to non-compliance, denies that on the facts of this case, the plaintiff's conduct can be said to be intentional and contumelious because the orders made on the summons for directions are not peremptory orders. Counsel cited *Bernard Chai v Klang Port Authority* [1999] 1 MLJ 650 in support of this submission. Therefore, submits counsel, non-compliance per se with the orders made do not give rise to an inference that the default is intentional and contumelious so as to warrant a striking out. Counsel also points out that ours is not a case where the court has acted under its own powers pursuant to O 34 r 8(2) RHC to call upon the plaintiff to show cause why this case

should not be struck out, which if it were the case and the plaintiff had refused to show cause or deliberately remained silent, it would be open to infer that the plaintiff's conduct was intentional and contumelious, as for example was the case in *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 a case relied upon by the defendant. I find there is merit in this submission of counsel for the plaintiff. In my judgment, the orders made on hearing of the summons for directions on 22 April 1998, were not peremptory or 'unless orders' and neither was this a case where the court had called on the plaintiff to show cause under O 43 r 8(2) of the RHC. In addition to the above the defendant has not been able to show and neither have I been able to detect any other conduct on the part of the plaintiff which might be characterised as intentional and contumelious.

With reference to the second complaint on inordinate and inexcusable delay, it is the submission of counsel for the plaintiff that the delay, if any, in failing to set this case down for trial is only of two months and such delay cannot be regarded as inordinate. In any event, submits counsel, even if it can be said that the two month delay is inordinate and because no explanation has been given for it the delay is to be regarded as inexcusable, to attract the draconian sanction of a striking out the defendant must still show that a fair trial is not possible as a result of such delay or the defendant has suffered serious prejudice. This the defendant has failed to do.

Counsel for the defendant on the other hand says a period of two months delay is inordinate and is also to be regarded as inexcusable in this case as the plaintiff has not sworn an affidavit to explain the delay.

Whether a period of delay is or is not inordinate is a question of fact, to be decided on the facts of each particular case. The question then is, can a delay of two months be described as inordinate? In *Leong Seng Kiat v Law Peng Guan & Ors* [1992] 2 CLJ 825 at p 827, the expression 'inordinate' was described as meaning 'materially longer than the time usually regarded by the profession and courts as an acceptable period.' An indication of what the profession and the courts regard as an acceptable, or rather not acceptable, period may be gleaned from looking at like cases to see what length of delay has prompted the court to strike out an action. All the cases mentioned below resulted in their being struck out for inordinate delay in complying with an order for directions:

(i) In *Datuk Samy Vellu v Karpal Singh* [1989] 3 MLJ 495, there was a delay of some six years from the filing of list of documents pursuant to the order for direction whereafter the action went to sleep and the date of the strike out application;

(ii) In *Yong Beng Credit Sdn Bhd v Tia Chong King t/a Polysan Co* [1993] 4 CLJ 502, there was a delay of one year three months from the order made on summons for directions to set down the action for trial to the date when it was set down;

(iii) In *Confidence Concrete Sdn Bhd v Shimizu-Peremba Sdn Bhd* [1994] 1 MLJ 465, there was a delay of four years between the date the order

was made for setting down for trial on a summons for direction and the date the strike out application was filed;

(iv) In *Lee Chong Ah v Cheong Chee & Ors* [1994] 3 CLJ 59, there was a six and a half years delay between the order for direction to set the case down for trial and the strike out application;

(v) In *Kuala Lumpur Finance Bhd v Yau Jiok Hua* Kuala Lumpur Civil Suit No D423-1604-88, there was a delay of one year nine months between the order made on summons for direction and the date the plaintiff served notice of intention to proceed;

(vi) In *Negara Properties Sdn Bhd (sued as a firm) & Ors v Akitek Bersekutu Malaysia* [1995] 2 MLJ 185, there was a delay of some three years between the date when on a summons for direction list of documents was to be served and when the list was actually served;

(vii) In *R Rajasingam v Balwant Singh Purba* [1996] 2 MLJ 549, there was a delay of six and a half months in filing the plaintiffs list of documents pursuant to the order of directions but this had been proceeded by a delay of six years.

Whilst the above cases show that the courts are getting less tolerant with delay, and the *R Rajasingam* case regarded six and a half months as inordinate, in my considered view, the period of two months delay in this case cannot be described as inordinate. As a consequence of this finding, the fact that the plaintiff has not sworn an affidavit in reply to explain the delay is not fatal nor would it advance the defendant's case on this ground. Even if it can be said that the delay of two months is inordinate and inexcusable, the defendant must still show, in accordance with the second limb of the principle in *Birkett v James*, that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants.

The defendant's complaint regarding the prejudice it has suffered as a result of the plaintiff's delay is fully set out in two paragraphs of the affidavit of Lee Yoke Meng @ Lee Yim Ming sworn on 16 September 1998 in support of the plaintiff's application. Paragraph 15 states that the delay is intentional and has caused great risk to the defendant whereby the defendant has been seriously prejudiced and para 15.1 states that the defendant is a well known finance company in Malaysia and the delay in prosecution of the action has prejudiced the defendant in name, time and expenses.

In my judgment, the above paragraphs of the defendant's affidavit do no more than make bare allegations and are insufficient to discharge the burden on the defendant of showing prejudice. To me, the bringing of actions against financial institutions are not uncommon and in the absence of a positive assertion or any substantiating evidence brought forth in the affidavit of the defendant, such as for example that this litigation has received wide coverage in the press, the defendant's allegation that its name

is prejudiced remains a bare one and in my view insufficient to establish prejudice. Similarly, there is no positive assertion or any evidence in the defendant's affidavit to show how much more expenditure the defendant has had to incur by the two month delay or what extra amount of time they have had to put into this litigation as a result of the two month delay. The facts and evidence pertaining to the prejudice allegedly suffered by the defendant are matters wholly within their knowledge and it is for them to make good and substantiate which they have not done. Consequently, it is my view that the principle stated in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted would not apply to the facts of this case because there is no such positive assertion so that the omission of the plaintiff to file an affidavit to refute or contradict the allegations do not give rise to any inference that the plaintiff admits the truth of the allegations nor does it mean that the court ought to accept the allegations as evidence of prejudice. See *Cold Storage Singapore (1983) Pte Ltd v Management Corp of Chancery Court & Ors* [1989] 3 MLJ 400.

To make up for the evidential deficiency in the defendant's affidavit, counsel for the defendant stated in submissions that because of the delay there will be difficulty in locating witnesses, that there will be failure in memory of witnesses, that with the suit hanging over the defendant's head its reputation will be affected. In considering these submissions, I find that in the first place they are an attempt to put evidence before the court and as such should rightly be made by affidavit and not made by counsel in chambers. Secondly, even if counsel should be allowed to make these submissions because a general statement about prejudice had been made in the defendant's affidavit, these submissions of counsel regarding the alleged difficulty in locating witnesses and fear for their failing memories would have merited consideration if the defendant had first identified for the court the issues on which witness evidence is vital and then identified who the relevant witnesses are and what role they played in relation to those issues and why those witnesses cannot now be located. The defendant not having first established the necessity for such witnesses I cannot attach weight to the submissions made. As regards the submission that with the case hanging over the head of the defendant its reputation would be affected, I find it to be but another version of the earlier submission on the defendant's name being prejudiced and what I said earlier on that matter applies equally here. In the circumstances and for the reasons given above, I find the defendant's allegation that they have suffered prejudice as a result of the two months delay not made out.

It was lastly argued by counsel for the defendant that following the recent decision of the Court of Appeal in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin* [1998] 4 MLJ 373, it is recognized that in addition to the two limbs of the principle stated in *Birkett v James*, there is now available a new limb for striking out for want of prosecution, namely, inordinate and inexcusable delay involving complete,

total or wholesale disregard of the rules of court amounting to an abuse of process which will itself constitute a ground for striking out without the need to show prejudice.

In the above case, Mokhtar Sidin JCA, referred to two decisions of the English Court of Appeal on case flow management. The first was the case of *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd & Ors* (1997) Times Law Reports, 29 December at p 698, from which case, his Lordship quoted approvingly what Lord Woolf MR said about the necessity for litigants and their legal advisers to observe the rules and time limits set by the court in progressing litigation within reasonable time with the pending changes to be made in England to their rules of court and which have now already come into effect. This is what Lord Woolf MR said:

> The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.

He also said:

> The change in culture which was already taking place would enable courts to recognize for the future, more readily than theretofore, that a wholesale disregard of the rules was an abuse of process.
>
> *While an abuse of process could be within the first category identified in* Birkett v James, *it was also a separate ground for striking out or staying an action, which did not depend on the need to show prejudice to the defendant or that a fair trial was no longer possible.* (Emphasis added.)

The second was the case of *Choraria v Sethia* (1998) Times Law Report, 29 January at p 43 in which Nourse LJ stated what he found the law to be on delay in the context of striking out for want of prosecution in the following terms:

> The law, as it is applied to this case could therefore be stated thus: Although inordinate and inexcusable delay alone, however great, did not amount to an abuse of process, delay which involved complete total or wholesale disregard, put it how you will, if the rules of court with full awareness of the consequences, was capable of amounting to such an abuse, so that, if it was fair to do so, the action would be struck out or dismissed on that ground. That was the principle on which the court had now to act. Whether it was identified as being comprehended within the first limb of *Birkett v James* or as one having an independent existence appeared to be a point of no importance.

Having considered the two English Court of Appeal decisions, this is what Mokhtar Sidin JCA said at p 385:

> From our observation, it is clear to us that from the two cases, there emerged an additional limb to strike out a plaintiff's claim. The original two limbs had been laid down in *Birkett v James*. We are not sure whether it is an offshoot of the second limb or it is a third limb. Be that as it may, this limb is important in view of the recent development in respect of case flow management. This new development is to overcome the backlog of cases now existing in courts

in England. This new limb as we understand it to be from the two cases is that where there is inordinate and inexcusable delay which involves complete, total or wholesale disregard of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse so that if it is fair to do so, the action will be struck out or dismissed on that ground. From the decisions too, it appears to us that there is no necessity to show prejudice in such cases.

There is no denial that in this country we have backlog of cases due to unnecessary delay. In fact, in some courts, the learned judge had taken the initiative to introduce case flow management in order to hasten the hearing of actions brought before his court. The importance of case flow management is for the parties to observe the time limits as provided by the law that the action could be brought to trial within time. It is true that some parties had caused unnecessary delay due to non-observance of the time schedule provided by the Rules. We have amended certain provisions in the Rules of the High Court 1980 whereby time limits are given such as filing of affidavits. Our courts are definitely moving towards this case flow management era. As such, we see no reason why we should not adopt the principles stated in those two decisions.

Relying on the above decision of the Court of Appeal in the *Trustee of Leong San Tong Khoo Kongsi* case, counsel for the defendant submitted that the failure of the plaintiffs to file their list of documents and set the action down for trial amounted to complete, total or wholesale disregard for the rules of court which amounts to an abuse of process for which this action should be struck out without the defendants having to show prejudice.

I welcome the development in our law in this area made by the Court of Appeal in the *Trustees of Leong San Tong Khoo Kongsi* case. However, insofar as the submission of counsel for the defendant is concerned, I regret I do not find that I can characterize what the plaintiff has omitted to do as complete, total or wholesale disregard for the rules. It is clear from a reading of the *Khoo Kongsi* case that the plaintiff there had been guilty of both pre-filing delay of some five years 11 months and had came to court just one month before the limitation period had set in. That was followed by post-filing delay of one year nine months when the plaintiff delayed in filing its application for direction. There then followed total inaction when the plaintiff let the action go to sleep and took no steps to have their summons for direction called on or fixed for hearing and it was the court that had to wake the plaintiff up by issuing a show cause notice. There are no similar features in our case. I also wish to say that insofar as the question of abusing the process of court is concerned, it does not lie in the mouth of the defendant to accuse the plaintiff of complete, total or wholesale disregard for the rules when the defendant's themselves are equally guilty of disregard of the rules in having filed a defence out of time without the leave of court, as observed by the deputy registrar, and in not having served their list of documents as required by the order made on direction.

In conclusion I also wish to make it clear that I have not overlooked the clear statements emanating from our higher courts that 'the courts are no longer prepared to tolerate the long delays with which the law has been associated. These days trial courts are anxious to clear the business assigned

to them. All others who are concerned in the administration of civil justice should ensure that the courts are not unnecessarily burdened with litigation which it is not intended to be prosecuted in earnest,' see *Public Finance Bhd v Natcom Development Sdn & Ors* [1996] 2 MLJ 657. I have however not found this case to be one that offends against the above statement.

In the circumstances, I allow the plaintiff's appeal with costs and set aside the order of the deputy registrar. I also order the plaintiff to serve their list of documents verified by affidavit within 30 days from the date hereof whereafter the plaintiff is to set this action down for trial within 60 days hereof failing which the plaintiff will be liable to show cause why this action should not be struck out under O 34 r 8(2) of the RHC.

Appeal allowed.

Reported by Benjamin Yong